

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

FILED

at 12 O'clock & 06 min. PM

Date 4/22/97

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *JB*

In the matter of:

LARRY ALLEN DENNIS

Debtor

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Chapter 7 Case

Number 93-40713

**ORDER ON DEBTOR'S OBJECTION TO THE RELEASE
OF FUNDS TO GEORGE BARNETT, E.S. ROBBINS, KENNY STONE,
JAMES L. DRAKE, JR., AND GRANT WASHINGTON**

On March 24, 1997, Debtor filed a Motion objecting to the release of funds to the above captioned parties. After considering the contentions in the Motion, and the entire record in this case, Debtor's Motion is denied. The Motion sets forth a number of separate grounds which are treated separately herein. Many of these contentions have been raised previously in this case and in Adversary Proceeding 93-4147.

- 1) The contention that the bankruptcy court deprived Larry Dennis, II, a 12 year old minor defendant, of his right to a fair trial by appointing an attorney who is also a creditor of the Debtor, Larry Allen Dennis.

On September 27, 1993, Trustee commenced Adversary Proceeding No. 93-04147 to recover an asset transferred from the Debtor, Larry Allen Dennis, to his minor son, Larry Dennis, II, prior to Debtor's bankruptcy and while Debtor was

insolvent. During a preliminary hearing on November 23, 1993, the suggestion was made by Trustee's counsel, Kenny Stone, that Debtor's minor son required separate court appointed representation - a point initially raised in defensive pleadings by the minor son's counsel Evelyn Hubbard. Because C. Grant Washington previously had represented the Debtor and, therefore, was familiar with the facts of the case, this Court signed an Order dated November 24, 1993, appointing Mr. Washington guardian ad litem for Larry Dennis, II. Debtor now contests that appointment on the ground that Mr. Washington was a creditor of the Debtor at the time of the appointment and not disinterested.

First and foremost, Debtor had timely notice of the appointment of Mr. Washington to serve as his son's guardian ad litem. Attorney Evelyn Hubbard was served with a copy of the order appointing Mr. Washington guardian during the time which she served as Debtor's bankruptcy counsel and Defendants' counsel in the adversary. Mr. Washington thereafter appeared regularly in his role as guardian. No appeal of that appointment, no objection, or motion to reconsider was ever made. The appointment became final and unappealable on December 24, 1993. Debtor is deemed to have waived any objection.

Moreover, Mr. Washington did not hold an interest adverse to Larry

Dennis, II. Debtor suggests that Mr. Washington was not disinterested because only if the Trustee recovered the real estate would funds be available to pay his fee. To the contrary, if Larry Dennis, II, retained the real estate, he would have owned an unencumbered parcel of land worth at least \$250,000 out of which he could satisfy Mr. Washington's fee.

Finally, any suggestion that a guardian ad litem for Debtor's son must be disinterested from Debtor is incorrect. In his brief, Debtor cites In re Martin, 817 F.2d 175, 179 (1st Cir. 1987), but that case holds that a debtor's Chapter 11 counsel must be disinterested in order to represent the debtor and not that a guardian ad litem for a non-debtor must be disinterested from the debtor. Under Georgia law, neither Article 4 of Georgia's Civil Practice Act, O.C.G.A. § 9-11-17(c), nor O.C.G.A. § 29-4-7 entitled "When guardian ad litem appointed; responsibility to minor," requires that the interests of counsel be in complete accord with each member of the minor's family. In fact, a guardian ad litem may be appointed for a minor if "he has no guardian or *his interest is adverse to that of his guardian.*" O.C.G.A. § 29-4-7. (emphasis added). In this case, a guardian ad litem was appointed precisely because Larry Dennis, II's, interests were adverse to that of Debtor's (his father's) estate. Moreover, on November 23, 1993, this Court made a finding that C. Grant Washington "is a person fully competent to understand and protect the rights of said

defendant and has no interest adverse to that of said minor child." Order Appointing Guardian Ad Litem, Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 8, Nov. 24, 1993. Debtor's contentions are without merit.

- 2) The contention that Debtor's counsel, counsel to Larry Dennis, II, and Trustee's counsel conspired, colluded, were ineffective, or intentionally deprived Debtor of effective representation.

This contention was addressed previously in Order on Defendants' and Debtor's Motion for Relief from Order Entered on October 4, 1994, Motion to Stay Sale of Farm (93-40713) and Motion to Stay Sale of Farm (93-4147), Ch. 7 Case No. 93-40713, Doc. 89, Nov. 27, 1996. In that Order, recognizing that rule 60(b)(6) relief is only to be granted in exceptional and extraordinary circumstances, I held that an attorney's alleged lack of legal understanding or carelessness does not provide grounds for Relief under Rule 60(b). *See Id.* at 18-20 citing Engleson v. Burlington N. R.R. Co., 972 F.2d 1038, 1043-44 (9th Cir. 1992); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990); Evans v. United Life & Accidental Insurance Co., 871 F.2d 466, 472 (4th Cir. 1989). Moreover, I noted that it also has been held to be an abuse of discretion to grant relief pursuant to Rule 60(b) on the basis of an attorney's negligence, *see In re Ellis*, 72 F.3d 628, 631 (8th Cir. 1995); Lomas & Nettleton Co. v. Wiseley, 884 F.2d 965, 967-68, 971 (7th Cir. 1989), and that these holdings were in general accord with the Supreme Court's

denial of the contention that a client should not suffer for the misdeeds of its counsel.

See Link v. Wabash R.R., 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390-91, 8 L.Ed.2d 734 (1962). Accordingly, pursuant to Rule 60(b)(6), the requested relief must be denied. See In re Watford, 192 B.R. at 281 (holding that Debtor was not entitled to relief pursuant to Rule 60(b) for counsel's failure to file a timely appeal).¹

3) The contention that Larry Dennis, II, was denied due process because Larry Dennis, II, was never served a summons and complaint from the court in Alabama

The contention that Larry Dennis, II, was denied due process because he was never served in certain Alabama State Court proceedings against Larry Allen Dennis is completely meritless. While in the process of pursuing Larry Allen Dennis, E.S. Robbins sued Larry Dennis, II, a/k/a Larry Dennis, d/b/a Larry Dennis Fencing as a defendant. Judgment in the amount of \$76,987.96 was rendered against Larry Dennis and not his minor son, Larry Dennis, II. See Final Judgment Against Larry Dennis, Aug. 20, 1991. Failing to serve Debtor's minor son did not impair any rights of Larry Dennis, II and, therefore, Debtor's contention is without merit.

¹ Included among Debtor's accusations of attorney misconduct and fraud is the contention that his attorney, Ms. Hubbard, and the attorney for the Trustee, Mr. Stone, knowingly concealed a trust deed which would have supported an inference that Debtor did not commit fraud. This contention is simply incorrect. First, at the hearing of July 20, 1994, Debtor's attorney attempted to introduce the trust deed into evidence although that request was denied because Debtor failed to furnish the trust deed to the Trustee as required by specific interrogatories. Second, this Court's Order of October 4, 1994, voided the transfer from Larry Allen Dennis to Larry Dennis, II, on the basis that Debtor was insolvent at the time of the transfers and not because of any fraudulent intent. Thus, even if the trust deed had been admitted into evidence, it would not have enabled the Debtor to overcome the presumption that he was insolvent at the time of the transfer pursuant to O.C.G.A. § 18-2-22(3).

- 4) The contention that because of improper service on Larry Allen Dennis the judgment of E.S. Robbins is void

On August 19, 1991, E.S. Robbins procured a default judgment in the amount of \$76,987.96 in the Circuit Court of Madison County, Alabama. Debtor contests that judgment claiming that service pursuant to Alabama law was never perfected and, therefore, this Court should void that judgment. Specifically, Debtor claims that the deputy sheriff, John T Cheers, appointed by the Alabama court as special process server, served Larry Maddox on July 6, 1991, instead of Larry Allen Dennis - both of whom were then residing at the Larry Dennis' farm. Debtor contends that this court may void a default judgment at any time for lack of jurisdiction.

While it may be true that a bankruptcy court has the authority to void a default judgment for lack of jurisdiction, this Court remains bound by principles of *res judicata*. On November 22, 1994, Debtor filed a "Motion for to Vacate Judgment as Void" in the case of E.S. Robbins Corporation, a corporation v. Larry Dennis, II, a/k/a Larry Dennis, d/b/a Larry Dennis Fencing, Civil Action No. CV91-128OB, alleging the same contentions that Debtor now raises in this Court. On February 27, 1995, the Circuit Court of Madison County, Alabama, denied the Motion to Vacate the Judgment. Debtor filed a Motion to Reconsider the Order of February 27, 1995,

which also was denied by the Circuit Court of Madison County, Alabama, by Order of the Court dated April 17, 1995. Accordingly, this Court being bound by principles of *res judicata* denies Debtor's objection.²

5) The contention that the Court should not consider certain accounts uncollectible in its Order of October 4, 1994

As mentioned previously, on September 27, 1993, Trustee commenced Adversary Proceeding No. 93-04147 to recover an asset transferred from the Debtor, Larry Allen Dennis, to his minor son, Larry Dennis, II, prior to Debtor's bankruptcy and while Debtor was insolvent. This Court held a trial on July 20, 1994, and by Order dated October 4, 1994, determined that at the time of the transfer, February 20, 1990, Larry Allen Dennis was insolvent and, therefore, the transfer was voidable under Subsection (3) of O.C.G.A. Section 18-2-22.³ Debtor now contends that the Court should not have considered certain accounts uncollectible in the Order of October 4, 1994, because at the time of the transfer they appeared to be collectible.

² Additionally, this Court notes that these issues were also raised in the November 28, 1995, hearing on Debtor's objection to the claim of E.S. Robbins and subsequently denied in the Order on Objection to Claim, Ch. 7 Case No. 93-40713, Doc. No. 63, Jan. 23, 1996.

³ Paragraph 3 of O.C.G.A. Section 18-2-22 provides as follows:

The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Without reaching the merits of Debtor's contention, it is suffice to say that Debtor may not relitigate the Order of October 4, 1994, at this time. Rule 60(b)(1) and (2) as amended by Bankruptcy Rule 9024 permit one to obtain relief from an otherwise valid Final Judgment based on mistake, inadvertence, surprise, excusable neglect, or newly discovered evidence. However, that statute further provides that any motion pursuant to Rule 60(b)(1) or (2) "shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." Fed.R.Bank.P. 9024. The Order of October 4, 1994, is obviously more than one year old, was affirmed by the District Court on July 10, 1995, and subsequently by the Eleventh Circuit Court of Appeals on March 8, 1996. The determination that Debtor, Larry Allen Dennis, was insolvent on February 20, 1990, is final.

6) The contention that the Court improperly permitted the Trustee to sell the farm for \$250,000.00

Debtor contends that this Court impermissibly approved the Trustee's sale of real estate for \$250,000. Debtor claims that the land has a greater value and cites an earlier contract for sale in the amount of \$296,276.00. On September 5, 1995, this Court signed an Order confirming the sale of the subject real estate, approximately 904 acres of land in Jenkins County, Georgia, for \$296,276.00. See

Order Confirming Sale, Ch. 7 Case No. 93-40713, Doc. No. 36, Sept. 5, 1995.

However, because the Debtor refused to surrender possession of the land, the Trustee was unable to timely deliver to the purchaser unencumbered real estate and the contract expired. On November 27, 1996, Trustee located a second purchaser willing to buy the land with the Debtor still in possession and willing to undertake the effort of bringing a dispossessory action against the Debtor, if necessary. At that time, this Court approved a second Order Confirming Sale in the amount of \$250,000. See Order Confirming Sale, Ch. 7 Case No. 93-40713, Doc. No. 90, Nov. 27, 1996.

Clearly, Debtor's decision to remain in possession of the land from September 1995 to November 1996 affected the marketability of the land and caused the reduction in value from \$296,000 to \$250,000. Trustee attempted for approximately one year to close the property at the higher price to no avail. On November 27, 1996, this Court held a hearing, and after considering the evidence presented as well as Debtor's objections determined that good cause existed to approve the sale. Id. at 1. Accordingly, any objection to the amount of the sale already has been considered, was overruled, and is overruled again.

7) The contention that Debtor should have been made a party to Adversary Proceeding 93-4147

This contention has been addressed previously on at least two separate occasions. In an Order dated August 24, 1995, this Court stated,

[T]he essence of the Motion is that the judgment should be set aside for failure to join Larry Allen Dennis as a party Defendant. The Court has carefully considered that allegation, notes that the Debtor was present throughout the proceedings, testified as a witness during the trial, was aware of the pendency of the case and had, if he had desired, every opportunity to seek to intervene, yet failed to do so. Given his actual knowledge of the pendency of the case, his opportunity to intervene which he never attempted to exercise and the fact that the Court concludes he was not an indispensable party, the Motion is denied.

Order on Motion by Debtor to Vacate or Set Aside Court's Decision for Lack of Jurisdiction, Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 64, Aug. 24, 1995, p. 2. Additionally, the Court revisited the issue in an Order dated September 1, 1995 and stated,

To the extent that the Defendants assert that Larry Allen Dennis was a necessary party who was not named as a Defendant, the motion sets forth no sound basis for setting aside this Court's final order and judgment. Bankruptcy Rule 7019 adopts Rule 19 F. R. Civ. P. and governs this issue. In pertinent part, rule 19 states, "[a] person . . . shall be joined as

a party in the action if . . . the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest" Larry Allen Dennis testified at the trial. Both Larry Dennis, II, and Tammy Ann Dennis were afforded the opportunity to question the witness. As previously mentioned, the adversary proceeding ultimately voided the transfers of real estate from Larry Allen Dennis to Larry Dennis, II, and from Larry Dennis, II, to Tammy Ann Dennis. Regarding the rights of Larry Allen Dennis, the adversary proceeding actually recovered an asset for the estate of Larry Allen Dennis, therefore, reducing the personal liability of Larry Allen Dennis. Thus, since the adversary proceeding actually benefitted the estate of Larry Allen Dennis to the fullest, his presence as a named defendant was anything but necessary.

Order on Defendants' Motion for Relief from Order Entered on October 4, 1994, Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 65, Sept. 1, 1995, pp. 2-3. Neither of the above Orders were appealed and are considered a final adjudication of this issue.

- 8) The contention that George Barnett does not have an allowable claim and that Larry Allen Dennis has a right to a hearing on the claim of George Barnett

Debtor contends that the claim of George Barnett should be disallowed and that Debtor has a right to an expanded hearing on his objection to the claim. After thoroughly reviewing these contentions, Debtor's request and objection is denied.

Briefly, on or about April 1, 1982, Debtor purchased a farm from George and Mary Lou Barnett, and the Barnetts provided the financing. Because of Debtor's subsequent default, the Barnetts instituted foreclosure proceedings in March of 1987 in the Circuit Court of Robertson County, Kentucky. On August 15, 1987, the Kentucky court entered a default judgment and the farm was sold pursuant to a court order. Because the foreclosure sale proceeds did not satisfy the judgment, an order awarding attorney's fees and liquidating the deficiency judgment was entered on October 13, 1987. In that order, the Kentucky court awarded the Barnetts \$35,321.21 with 12% interest per annum until paid. Mr. Barnett submitted a proof of claim on January 28, 1994, for \$58,790.00.

Throughout this case, Debtor repeatedly has contested the validity of the Barnetts' judgment. See Debtor's Objection to Claim of George and Mary Lou Barnett, Ch. 7 Case No. 93-40713, Doc. No. 36, Sept. 5, 1995; Defendant's Motion for Relief from Order Entered on October 4, 1994, Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 63, July 14, 1995; Defendant's Second Motion for Relief from Order Entered on October 4, 1994, Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 94, Nov. 14, 1996; Debtor's Motion to Stay Sale of Farm, Ch. 7 Case No. 93-40713, Doc. No. 84, Nov. 14, 1996; Defendant's and Debtor's Motion to Reconsider or Vacate the Court's Order on Defendant's and Debtor's Motion for Relief Order

Entered October 4, 1994, and November 27, 1996, Ch. 7 Case No. 93-40713, Doc. No. 93, Dec. 5, 1996. However, on each occasion I have held that absent a repeal of the Full Faith and Credit Act, a federal court must give a state court judgment the same effect that it would have in the courts of the State in which it was rendered, *see* 28 U.S.C. § 1783, and that any challenge to the Barnetts' judgment may be commenced only in the state of Kentucky.

While no separate hearing was conducted to consider Debtor's objection to the Barnett claim, the substance of his objection was fully litigated in connection with the above-cited motions. Accordingly, on February 21, 1997, this Court entered an Order on Debtor's objection to the claim of George and Mary Lou Barnett. *See* Order on Debtor's Objection to Claim of George and Mary Lou Barnett, Ch. 7 Case No. 93-40713, Doc. No. 103, Feb. 21, 1997. In that Order, I concluded, after reviewing Debtor's pleadings, that all of his objections relating to the validity of the Barnett judgment would be denied as a matter of law without further hearing, because Debtor again was raising the same contentions and relying on the same exhibits addressed during previous hearings. *See Id.* at 3. That Order provided that the Barnett claim would be allowed unless Debtor had made any post-judgment payments to the Barnetts. Debtor filed a Motion to Reconsider and after review I broadened the scope of the evidence that I would consider to include whether Debtor

is entitled to credit for crop proceeds from the year 1987. Debtor now requests this Court to reconsider that Order asserting (1) that he has a right to a full hearing, and (2) that this Court is not required to give full faith and credit to the judgment of George Barnett because it was procured by fraud.

Debtor does not have a right to relitigate other issues. In support of his position, Debtor relies on this Court's Order of June 28, 1996, which stated that "[t]he Clerk will issue a notice of continued hearing for the first available date following the conclusion of any discovery requests initiated in conformity with the terms of this Order" See Order, Ch. 7 Case No. 93-40713, Doc. No. 77, June 28, 1996. Although at that time a separate hearing on the objection was contemplated, the issue was adjudicated fully and made moot by the proceedings held on Debtor's subsequent pleadings in which he directly attacked the Barnett judgment on the same grounds he now asserts. Subsequent to the scheduling Order of June 28, 1996, I issued a series of Orders in which Debtor's challenge to the claim of the Barnetts was addressed and fully adjudicated. See Order Denying Defendant's and Debtor's Motion for Relief from Order Entered on October 4, 1994, Motion to Stay Sale of Farm (93-40713) and Motion to Stay Sale of Farm (93-4147), Ch. 7 Case No. 93-40713, Adv. Proc. 93-4147, Doc. No. 100, Nov. 27, 1996; Order Denying Defendant's and Debtor's Motion to Reconsider or Vacate the Court's Order on Defendant's and

Debtor's Motion for Relief Order Entered October 4, 1994, and November 27, 1996,
Ch. 7 Case No. 93-40713, Doc. No. 104, Dec. 6, 1996. Because the above mentioned
Orders addressed the validity of the Barnetts' judgment, that issue is *res judicata* and
this Court will not hold a hearing to reconsider Debtor's contentions.

Alternatively, as a matter of law, Debtor's contentions must be
denied. Debtor claims that the Barnetts defrauded him in the original sale by
conveying fewer acres than represented in the deed, or during foreclosure by either
(1) selling the land for less than fair market value or (2) by not crediting Debtor for
all sums received. Thus, Debtor contends that this Court should not enforce the
judgment pursuant to Rule 60(b). However, Rule 60(b)(3) as adopted pursuant to
Bankruptcy Rule 9024 states, in pertinent part,

On motion and upon such terms as are just, the court may
relieve a party or a party's legal representative from a final
judgment, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or
extrinsic), misrepresentation, or other misconduct of the party.

The motion shall be made within a reasonable time, and for
reasons (1), (2), and (3) not more than one year after the
judgment, order, or proceeding was entered or taken.

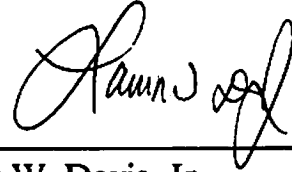
Clearly, the rule as it relates to the alleged facts requires Debtor to bring any motion relating to fraud, whether intrinsic or extrinsic, within one year of the judgment. The judgment was issued in 1987 and Debtor now contests its validity approximately nine years later. The scope of Rule 60(b) is not broad enough to encompass such a challenge. Additionally, the court in which the fraud was committed is the appropriate court to consider the matter. See Taft v. Donellan Jerome, Inc., 407 F.2d 807 (7th Cir. 1969) (holding that the court in which the fraud was committed is the only court that can decide the question and it cannot be raised by an independent action in another court).

Accordingly, Debtor's Motion for a full hearing to relitigate the enforceability of the Barnett judgment allegedly procured by fraud is denied. The previous Orders of this Court are final and the judgment obtained by George and Mary Lou Barnett against the Debtor in the Circuit Court of Robertson County, Kentucky will be given full faith and credit by this Court. The Barnett claim is allowed as filed except to the extent that Debtor has made any post-judgment payments or receives credit for 1987 crop proceeds.⁴

⁴ On March 31, 1997, this Court held a hearing to consider two issues: (1) whether Debtor made any post-petition payments and (2) Debtor's right in 1987 crop proceeds. Those issues will be addressed by separate order.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT
that Debtor's Motion is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of April, 1997.